

Supreme Court of the United States

No. 474. October Term, 1939.

JOSEPH D. McGOLDRICK, Comptroller of
the City of New York,

Petitioner,

against

A. H. DUGRENIER, Inc., Principal, and
STEWART & MCGUIRE, Inc., Agent.

ON WRIT OF CERTIORARI TO THE SUPREME COURT
OF THE STATE OF NEW YORK.

BRIEF FOR PETITIONER.

December 26, 1939.

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A writ of certiorari was granted by this Court on December 4, 1939, to review a final order of the Court of Appeals, affirming (one Judge dissenting) a final order of the Appellate Division of the Supreme Court of the State of New York, First Judicial Department, nullifying the petitioner's determination that certain sales taxes were due and owing to him as Comptroller of the City of New York. The amount of tax in controversy is \$6,203.27, with interest, for the period from December 10, 1934 to September 30, 1936 (R. 6-7, 45).

The Court of Appeals nullified the petitioner's determination upon the sole ground that to require the respondents to collect the sales tax from their New York customers on local purchases of vending machines shipped from Massachusetts, was violative of the Commerce Clause (Art. I, Sec. 8, Cl. 3).

Opinions Below.

The memorandum opinion of the Appellate Division of the Supreme Court of the State of New York, First Judicial Department (R. 46), before which the proceedings to review the Comptroller's determination were heard in the first instance (New York Civil Practice Act, Art. 78), is reported in 255 App. Div. 961 (1938).

The Court of Appeals wrote no opinion, merely affirming with costs (281 N. Y. mem. 32, 22 N. E. (2d) 172 [1939]). In a supplemental memorandum on motion for reargument or amendment of the remittitur, the Court of Appeals declared that the decision below was affirmed (R. 55) "upon the sole ground that the City Sales Tax Law as here applied violates the Commerce Clause (Art. I, Sec. 8, cl. 3) of the Constitution of the United States." (281 N. Y. mem. 93, 22 N. E. (2d) 764 [1939]).

Jurisdiction.

The writ of certiorari was issued pursuant to the power conferred upon this Court by U. S. Code, Title 28, Sec. 344, subsec. b. The decision below having sustained the claimed federal right, and the federal question being the sole ground of the decision (R. 55), a case was made out within the cited statute for this Court to issue the writ.

Statement of the Case.

A. H. DuGrenier, Inc., one of the respondents, is a Massachusetts corporation engaged in the business of manufacturing and selling automatic vending machines (R. 4, 32). All of its sales are made through Stewart & McGuire, Inc., the other respondent, a New York corporation (R. 4) with its offices in New York City (R. 35, 36), which operates on a commission basis (R. 4-5, 33).

The machines are standard products, color only being optional (R. 39). They are sold by the personal solicita-

tion of Stewart & McGuire's salesmen (R. 36). Samples are carried in the New York office, in addition to the samples used by the salesmen (R. 37, 38). On occasion the samples are sold (R. 37-39), and, of course, such sales are taxable. The machines involved in the disputed sales are not manufactured to order, but are held at Haverhill, Mass., in stock sizes in quantity sufficient to meet future demands (R. 33-34, 39).

Most sales are made under conditional sales contracts under which title to the machines does not pass to the New York City purchaser until full payment is made (Taxpayer's Exhibit 1, R. 40A). Under these contracts the purchaser is required to make one payment "upon signing", another "on delivery" and the balance each month thereafter (*ibid.*). The Stewart & McGuire salesman presents the contract to the purchaser for signature, taking back the signed contract, the initial cash payment and the notes, if any (R. 35-38). These documents are then forwarded to DuGrenier at Haverhill, Mass. (*Ibid.*) DuGrenier delivers the machines directly from Massachusetts to the buyer in New York City, by whatever mode of shipment the buyer has specified (R. 37).

While all orders taken are subject to confirmation by DuGrenier in Haverhill, Mass. (R. 33, 35), there is no evidence that the customer is ever notified of confirmation. The requirement of Haverhill confirmation apparently serves no purpose other than to allow for credit checking (R. 35-36). That the credit checking is a mere formality is evidenced by the fact that DuGrenier relies primarily on its retention of title to the machines (Taxpayer's Exhibit 1, R. 40A) as its security for payment (R. 38).

The New York City Sales Tax Law.

This tax was first enacted on December 10, 1934, as part of a comprehensive program of tax measures by

which New York City was to finance its pressing emergency relief needs on a pay-as-you-go basis.¹ As appears from the Appendix of Statutes to be submitted on the argument, it was enacted pursuant to emergency enabling legislation passed by the State legislature (Laws of 1933, ch. 815 [Appendix C], Laws of 1934, ch. 873 [Appendix B] and amendments and renewals thereof). The enabling act declared that an emergency existed requiring the imposition of taxes "to relieve the people * * * from the hardships and suffering caused by unemployment and the effects thereof on the public health and welfare." It authorized the City of New York to "adopt and amend local laws imposing in any such city any tax which the legislature has or would have power and authority to impose." The revenues from the taxes were required to be used exclusively for emergency unemployment relief.

The tax imposed by Local Laws No. 20 of 1934, as amended (printed as Appendix A in the Appendix of Statutes), No. 29 of 1935 and No. 31 of 1936,² is limited to purchases for consumption. Purchases for resale are exempt under a definition of retail sale having that express purpose (Sec. 1g). A purchaser who has paid the tax and later resold may, upon filing a proper certificate of resale, obtain a refund of the taxes paid (Sec. 14).³

¹ Certain of these measures were before this Court in *New York Rapid Transit Corp. v. City of New York*, 303 U. S. 573 (1938), where they were sustained as against asserted contravention of the Fourteenth Amendment.

² The sales covering the period December 10, 1934 to December 31, 1935, were taxed under Local Law No. 20 of 1934, as amended. Those for the period January 1, 1936 to June 30, 1936, were taxed under Local Law No. 29 of 1935, and for the period July 1, 1936 to September 30, 1936, under Local Law No. 31 of 1936. The Local Laws for the later periods are identical in every material respect with Local Law No. 20 of 1934, as amended.

³ Under the New York City emergency relief business tax law, on the other hand, wholesale as well as retail vendors are taxed. Local Law No. 9 of 1934 and its successors.

The sales tax applies with respect to the following kinds of purchaser-consumers (Secs. 2a, b, c and d):

- 1) Consumers of goods,¹ excluding food and drugs on prescription.
- 2) Consumers of utility services;² i. e., gas, electricity, telephone, etc.
- 3) Customers in restaurants and cafes where the meals are over \$1.³

The tax is imposed not on the seller⁴ but on the buyer. The statute makes this abundantly clear and the Courts have so held (*Matter of Merchants Refrigerating Co. v. Taylor*, 275 N. Y. 113, 124 [1937]; *Matter of Kesbec, Inc. v. McGoldrick*, 278 N. Y. 293, 297 [1938]).

The statute provides that the tax is payable "by the purchaser to the vendor, for and on account of the city of New York" (Sec. 2). The vendor is liable for collection, filing of returns and payment over to the City and has "the same right in respect to collecting the tax from the purchaser, or in respect to non-payment of the tax by the purchaser as if the tax were a part of the purchase price of the property or service" (Sec. 2). The vendor is required to state and charge the tax separately from the sales price (Sec. 2). Failure to do so or failure to collect the tax as such renders the vendor subject to criminal penalties (Sec. 15). It is also a crime for the vendor to advertise that he is absorbing the tax (Sects. 2, 15). Where the

¹ The vendors of goods, on the other hand, are taxed under the New York City emergency relief business tax law. Local Law No. 9 of 1934, and its successors.

² The vendors of utility services are taxed under the New York City emergency relief utility tax law. Local Law No. 19 of 1933, and its successors.

³ The restaurateurs are liable for a business tax.

⁴ No license is required of the seller, or of anyone else for that matter, as a condition of making the sale.

vendor fails to collect the tax, the purchaser-consumer is required within fifteen days to file a return and pay the tax directly to the Comptroller, and the Comptroller is authorized to proceed directly against the purchaser for payment of the tax (Sec. 2).

Specification of Errors to be Urged.

We contend that the Court of Appeals erred:

- (a) In holding that the New York City sales tax as applied to the respondents' sales constituted an unconstitutional burden on interstate commerce.
- (b) In holding that the sales which were the subject of the tax were contracts for interstate shipments, or otherwise required or necessarily involved interstate commerce, giving in so holding an erroneous interpretation of *Wiloil Corporation v. Pennsylvania* (294 U. S. 169 [1935]).
- (c) In regarding itself as compelled by the Commerce Clause to affirm the determination of the Appellate Division, and annul petitioner's determination of tax liability.

Argument.

In our brief in the companion case of *McGoldrick v. Berwind-White Coal Mining Co.*, we discussed at length the principles and authorities applicable to the case at bar. The facts in the companion case of *McGoldrick v. Felt & Tarrant Manufacturing Co.* are indistinguishable from the facts at bar. Copies of our briefs in the two cases referred to have been furnished to counsel for the taxpayers in the case at bar.

It was our purpose in those briefs to demonstrate that, from whatever angle the problem is approached, the burden and effect of the tax here in controversy are the

same, whether imposed upon a sale of goods produced or stored within or without the State.

It is our contention that if we are correct in that analysis, the tax at bar must be sustained. For if its effect on interstate commerce is identical with its effect upon local commerce, it cannot violate the Commerce Clause.

In order to avoid unnecessary repetition, we respectfully refer the Court to our briefs in the *Berwind-White* and *Felt & Tarrant* cases for a statement of our position.

Conclusion.

The final order and judgment should be reversed and petitioner's determination confirmed.

December 26, 1939.

Respectfully submitted,

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